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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 40

WILLIAM JOE JOHNSON,

Petitioner,

—v.—

HARRY S. AVERY, Commissioner, Department of Correction
and LAKE RUSSELL, Warden, Tennessee State Peniten-
tiary,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF
AMICI CURIAE OF THE AMERICAN CIVIL LIBER-
TIES UNION AND THE AMERICAN CIVIL LIBER-
TIES UNION OF TENNESSEE**

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Motion for Leave to File Brief Amici Curiae¹

The American Civil Liberties Union believes that the constitutional rights of prisoners should be as closely guarded as those of citizens in general, perhaps more so since the usual political process is generally unavailable to prisoners for the redress of their grievances.

The ACLU believes that this case presents important questions as to the rights of two separate classes of prisoners: the First Amendment right of prisoners to give legal aid to fellow inmates, and the right of untutored or il-

¹ Counsel for Petitioner consented to the filing of this brief. Counsel for Respondents did not reply to Amici's request for consent.

literate inmates to receive such assistance in order to have free access to the courts.

There has for too long been a "vast no man's land between the constitutional rights of a prisoner on the one hand and the disciplinary rights of the authorities on the other hand" ² and the ACLU wishes to take this occasion to urge the Court to enunciate clearly that prisoners are not "constitutional non-persons" but that they retain all the rights of ordinary citizens, including that of free speech, except to the extent that they may be curtailed by the compelling need to maintain necessary discipline.

Respectfully submitted,

MELVIN L. WULF

Attorney for Movants

² *Beckett v. Kearney*, 247 F. Supp. 219, 220 (N. D. Ga. 1965).

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
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**BRIEF AMICI CURIAE OF THE AMERICAN CIVIL
LIBERTIES UNION AND THE AMERICAN CIVIL
LIBERTIES UNION OF TENNESSEE**

Interest of Amici

The interest of Amici is set out in the preceding motion.

Statement of Facts¹

Petitioner is a prisoner in the Tennessee State Peniten-
tiary who was placed in solitary confinement for violating
a prison regulation which absolutely forbids inmates to

¹ Adopted from petitioner's brief.

"advise, assist or otherwise contract to aid" another inmate, whether with or without a fee, in the preparation of petitions for habeas corpus or other legal papers.

After serving eleven months in solitary confinement petitioner brought an action in the United States District Court for the Middle District of Tennessee, seeking relief under the Civil Rights Act. The District Court treated the action as a petition for habeas corpus and ordered petitioner's release from solitary confinement. It held that the prison regulation conflicted with 28 U. S. C. §2242, and further that it had the effect of suppressing the assertion of federal constitutional rights by prisoners who are unable to draft their own petitions.

On appeal, the United States Court of Appeals for the Sixth Circuit reversed. It found that petitioner had standing, and that habeas corpus was the appropriate means of attacking the validity of confinement for disciplinary reasons. However, it found that courts should only review the internal management of prison affairs when there is a clear interference with fundamental constitutional rights, and that no such interference was shown in the instant case. The court further held that Tennessee has the right to regulate the practice of law within that state, and that neither the Constitution nor 28 U. S. C. §2242 allow a prisoner the right to assist a fellow prisoner in legal matters.

ARGUMENT

I.

Petitioner was punished for exercising his right to free speech protected by the First and Fourteenth Amendments.

We urge this Court to adopt the theory, first accepted in *Coffin v. Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), cert. denied, 355 U. S. 887 (1945), that

"A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."

Though certain rights and privileges must be limited by the necessities of the penal system, see, e.g., *Price v. Johnston*, 324 U. S. 266 (1948) (right of prisoner to personally argue his appeal), the category of such curtailed rights should be narrowly confined by the Constitution.

While prison discipline need not bow before the entire range of constitutional rights, it is clear that the due process and equal protection clauses of the Fourteenth Amendment follow convicted persons into prison. E.g., *Jackson v. Godwin*, No. 25299 (5th Cir. July 23, 1968); *Lee v. Washington*, 263 F. Supp. 327, 331 (M. D. Ala. 1966), aff'd per curiam, 390 U. S. 333 (1968); *Jackson v. Bishop*, 268 F. Supp. 804, 807 (E. D. Ark. 1967). A prisoner retains the rights incorporated by those clauses, including, as here, the freedom of speech guaranteed by the First Amendment.

The federal courts have given increasingly broad consideration to the protection of the so-called "retained

rights" of prisoners. Most notable, perhaps, has been the protection of freedom of religion in the Black Muslim cases. E.g., *Sostre v. McGinnis*, 334 F. 2d 906 (2nd Cir. 1964), cert. denied, 379 U. S. 892 (1964); *Seu'ell v. Pegelow*, 291 F. 2d 196 (4th Cir. 1961); cf. *Cooper v. Pate*, 378 U. S. 546 (1964). Prisoners have also been held to retain the right to be free from cruel and unusual punishment, e.g., *Wright v. McMann*, 387 F. 2d 519 (2nd Cir. 1967), and from unreasonable searches and seizures, e.g., *Hayes v. United States*, 367 F. 2d 216 (10th Cir. 1966). Prisoners are entitled to adequate medical care, as that is included within the rubric of due process of law, e.g., *Edwards v. Duncan*, 355 F. 2d 993 (4th Cir. 1966); *Coleman v. Johnston*, 247 F. 2d 273 (7th Cir. 1957). This Court implicitly recognized the rights of prisoners to be protected against self-incrimination in the recent case of *Mathis v. United States*, 391 U. S. 1 (1968).

In the area of racial discrimination, this Court and lower federal courts have held that the equal protection clause forbids arbitrary discrimination in the treatment of prisoners. See, e.g., *Lee v. Washington*, *supra*; *Toles v. Katzenbach*, 385 F. 2d 107 (9th Cir. 1967); *Rivers v. Royster*, 360 F. 2d 592 (4th Cir. 1966). And, of course, there is a long line of cases, to be discussed *infra*, beginning with this Court's decision in *Ex parte Hull*, 312 U. S. 546 (1941), guaranteeing prisoners the right of access to the courts.

The broad range of protected rights in these cases supports the "retained rights" doctrine.⁴ Further, it is clear

⁴ A retained rights theory protecting freedom of speech is not only constitutionally required, it is effective penology. As the President's Crime Commission Task Force on Corrections found:

that when such rights conflict with the claims of internal prison administration, the courts cannot adopt a "hands off" attitude but must intervene to protect constitutional rights. See, e.g., Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa. L. Rev. 985 (1962); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Prisoners*, 72 Yale L. J. 506 (1963).

If, therefore, prisoners retain the rights of ordinary citizens, they must retain the most precious of those rights, that of freedom of expression. Prison officials should not be allowed to employ "requirements of prison discipline

"... a first principle for any correctional institution is that staff control can be greatest, and certainly inmate life will be most relevant to that in the free community, if rules regulating behavior are as close as possible to those which would be essential for law and order in any free community, together with such minimal additional rules as are necessary to meet the conditions peculiar to the institution." *Task Force Report*, at p. 50.

* Using language in *Price v. Johnston*, *supra*, the Federal courts have fashioned a so-called "hands off" doctrine by which they refuse to intervene in matters involving prison discipline. Under varying circumstances, "hands off" has not been permitted to interfere with consideration of prisoner allegations of deprivation of rights. A number of standards have been applied to determine whether a court will take cognizance of a prisoner's complaint. Some of the standards employed have been: an alleged violation of a legal right by an abuse of discretion by prison officials, *Fulwood v. Clemmer*, *infra*, at p. 375; an alleged violation of a constitutional right, *United States ex rel. Cleggett v. Pate*, 229 F. Supp. 818, 819 (N. D. Ill. 1964); "extreme circumstances," *Lee v. Tahash*, 352 F. 2d 970 (8th Cir. 1965); *Childs v. Pegelow*, 321 F. 2d 487, *cert. denied* 376 U. S. 932 (1964); "unreasonable regulations," *United States ex rel. Morris v. Radio Station WENB*, 209 F. 2d 105, 107 (7th Cir. 1953), *Lockhart v. Prasse*, 250 F. Supp. 529, 531 (E. D. Pa. 1965); "only in a rare and exceptional situation," *Carey v. Settle*, 351 F. 2d 483, 485 (7th Cir. 1965).

If a "retained rights" theory is accepted, then the courts must intervene when such rights are threatened or denied.

and security" to abridge this preferred right. Note, *The Rights of Prisoners While Incarcerated*, 15 Buffalo L. Rev. 397, 424 (1965). Cf. *NAACP v. Button*, 371 U. S. 415 (1963).

The belief that democracy depends upon a "free marketplace of ideas" is no less valid within the prison setting than in the community at large. Most prisoners, even those sentenced to life terms, will eventually return to take their place in society. In the otherwise restricted society in which they exist, the need for a free exchange of ideas is all the more important to hopes of their rehabilitation. To this end, communication between prisoners and the outside world, and the exchange of ideas among inmates, should be encouraged, not forbidden.* See, e.g., Barnes and Teeters, *New Horizons in Criminology* 492 (3rd ed. 1959), Amer. Correctional Assn., *Manual of Correctional Standards* 400 (1959), Cloward, "Social Control in the Prison," in *Theoretical Studies in Social Organization of the Prison*, 20, 25-27 (Conference Group on Correction Organization 1960).

The petitioner in this case engaged in activity which clearly would have come within the protection of the First Amendment had he been an ordinary citizen. He spoke with fellow prisoners and discussed the cause of their imprisonment. When illiterate fellow prisoners believed their convictions to be unconstitutional, petitioner prepared papers containing a summary of facts of those convictions and the papers were sent to various courts as petitions for habeas corpus.

*Petitioner was punished not only because he prepared writs for other prisoners, but also because he "encouraged" others to prepare writs (A. 26).

If petitioner were not a prisoner, he would have been completely free to engage in the activity in question. Under the retained rights theory, he should be similarly free unless his activity created a clear and present danger of some substantial evil which the state had a legitimate interest in preventing. See *Schene v. United States*, 249 U. S. 47 (1919). Restrictions on prisoner speech can, therefore, only be justified where prison officials can demonstrate that there is a clear and present danger that the speech sought to be regulated would cause, or be likely to cause, disruption, violence, or a substantial breach of prison security. *Long v. Parker*, 390 F. 2d 816, 822 (3rd Cir. 1968). See e.g., *Cooper v. Pate*, 382 F. 2d 518 (7th Cir. 1968). Note, *The Right of Expression in Prison*, 40 So. Cal. L. Rev. 407, 420-22 (1967).⁷

Under this test it cannot be said that petitioner's action in speaking with and assisting untutored and illiterate fellow inmates with legal problems created a clear and present danger of breach of prison security or the orderly functioning of the institution. Certainly there is no such showing in the record of this case. The activity in which petitioner engaged was expression protected by the First and Fourteenth Amendments (Cf. *NAACP v. Button*, *supra*) and the regulation in question must be found invalid as an unconstitutional infringement of those rights.

⁷ Respondents contention that petitioner's actions constituted the unauthorized practice of the law is briefed in petitioner's brief.

⁸ The clear and present danger test has also been applied to regulations interfering with the exercise of religion in Black Muslim cases, e.g., *Cooper v. Pate*, 382 F. 2d 518 (7th Cir. 1968); *Banks v. Havener*, 234 F. Supp. 27, 30 (E. D. Va. 1964).

II.

The regulations in question violate due process of law and the Privileges and Immunities Clause by denying access to the courts to those unable to prepare their own papers.

The right of free access to the courts is a right which may not be withdrawn by legislation or regulation. It is one of the Privileges and Immunities enumerated in the *Slaughterhouse Cases*, 21 L. Ed. 394, 409. "It is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious." *Coleman v. Peyton*, 362 F. 2d 905, 907 (4th Cir.), cert. denied, 385 U. S. 905 (1966). It is in fact the right upon which all others depend. If a prisoner cannot secure a judicial hearing, his other rights are illusory. *Stiltner v. Rhay*, 322 F. 2d 314, 316 (9th Cir. 1963). Comment *The Rights of Prisoners While Incarcerated*, 15 Buffalo L. Rev. 397, 414 (1965); Note, *Constitutional Rights of Prisoners; The Developing Law*, 110 U. Pa. L. Rev. 985, 987-92 (1962).

Access to the courts is also required to vindicate the right to petition for habeas corpus. As this Court acknowledged

"... the writ of habeas corpus is the precious safeguard of personal liberty, and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U. S. 19, 26 (1939).

And "when an equivalent right is granted by a state" any regulation or barrier which tends to inhibit the availability

of the remedy must be scrutinized with equal care. See *Smith v. Bennett*, 365 U. S. 708, 713 (1961).

Beginning with this Court's decision in *Ex parte Hull*, 312 U. S. 546 (1941), courts have scrupulously examined prison regulations or procedures which have the effect of suspending the writ of habeas corpus. In *Hull*, this Court struck down a prison rule requiring that all habeas petitions be approved by a legal officer of the parole board before being forwarded to the proper court.

Lower courts have similarly scrutinized rules which effectively interfere with free access to the Court. See, e.g., *Spires v. Dowd*, 271 F. 2d 659 (7th Cir. 1959) (warden's order on request of state judge forbidding prisoner to correspond with either judge or clerk of state court struck down), *Hymes v. Dickson*, 232 F. Supp. 796 (N. D. Cal. 1964) (prisoners should not have to answer to authorities for allegations in complaints addressed to courts), *People v. Superior Court*, 273 F. 2d 936 (Cal. Dist. Ct. App. 1954) (prison authorities must forward petitions to court no matter how false the allegations contained therein). See also *DeWitt v. Pail*, 366 F. 2d 682 (9th Cir. 1966); *Coleman v. Peyton*, *supra*; *Edwards v. Duncan*, *supra*; *Lee v. Takash*, 352 F. 2d 970 (8th Cir. 1965); *U. S. ex rel. Wakely v. Commonwealth of Penna.*, 247 F. Supp. 7 (E. D. Pa. 1965).

The right of access to the courts has been necessarily broadened to include the right to correspond with counsel about parole or violation of an inmate's rights, e.g., *Fulwood v. Clemmer*, 206 F. Supp. 370, 376 (D. D. C. 1962), including the right to communicate derogatory or critical statements about prison officials to counsel. *In re Ferguson*, 55 Cal. 2d 663, 677, 361 P. 2d 417, 425, *cert. denied*, 368

U. S. 864 (1961). Correspondingly, prison officials may not interfere with correspondence designed to secure legal assistance, *McCloskey v. State of Maryland*, 337 F. 2d 72, 74-75 (4th Cir. 1964).

Thus the Courts must factually examine each situation to determine whether prisoners possess effective means to vindicate their right of access to the courts. In the instant case, such access is openly denied by the regulation in question. To prohibit untutored or illiterate prisoners from obtaining the aid of fellow prisoners in writing letters or legal papers is, in the absence of specific provision for other assistance, as much a denial of access to the courts as the unqualified refusal to mail all legal papers. It is, as the District Court found, "... the practical denial to an indeterminate number of prisoners who are incapable of preparing their own requests or petitions of their day in Court." *Johnson v. Avery*, 252 F. Supp. 783, 784 (M. D. Tenn. 1966). As such, the regulation must be struck down.

III.

The regulation in the instant case is a violation of Article 1, Section 9, of the United States Constitution and of the equal protection of the laws.

Art. I, Sec. 9, Clause 2, of the Constitution provides that

"The privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

This provision applies not only to overt legislative attempts to abolish the writ, but to laws or regulations which have the effect of making the writ unavailable. Such laws or regulations need not work a universal suspension, but need only have the effect of limiting or withdrawing the writ from some group or class of persons who would otherwise be entitled to exercise their rights to habeas corpus.

In *Sanders v. United States*, 373 U. S. 1, 11-12, fn. 6 (1963), this Court suggested that to apply a strict rule of *res judicata* to habeas corpus would be an unconstitutional suspension of the writ, at least for those prisoners whose claims had already been presented to the courts. Similarly, 28 U. S. C. §2255 could only be upheld by finding it equivalent in scope to habeas corpus, and therefore no suspension of the writ. *United States v. Hayman*, 342 U. S. 205, 209 (1952). And to place financial barriers between indigent prisoners and the exercise of the writ would also work an unconstitutional suspension. Cf. *Smith v. Bennett*, *supra*, at p. 712.

In *Smartt v. Avery*, 370 F. 2d 788 (6th Cir. 1967), a regulation of the state parole board which in effect postponed for a year parole consideration for any prisoner who filed an unsuccessful petition for habeas corpus was held to violate article 1, sec. 9, clause 2.

A regulation which totally bars illiterate prisoners from filing petitions or otherwise seeking outside aid for filing petitions has the effect of suspending the writ of habeas corpus for those prisoners. As such, the regulation in the instant case is also a violation of article 1, section 9, clause 2, and cannot stand.

The regulation in question is also a denial of the equal protection of the laws. Where an identifiable group is discriminated against, denying that group rights or privileges available to others, equal protection is violated. See, e.g., *Peterson v. City of Greenville*, 373 U. S. 244 (1963) (state action enforcing segregation on the basis of race); *Baker v. Carr*, 369 U. S. 186 (1962) (state failure to reapportion legislature). Thus, this Court held, a rule denying full appellate review to a prisoner who could not afford to purchase a transcript is a violation of equal protection. *Griffin v. Illinois*, 351 U. S. 12 (1956). See *Burns v. Ohio*, 360 U. S. 252 (1959) (filing fee for criminal defendant to docket motion for leave to appeal).

It is clear that in the process involving the determination of guilt or innocence, or the alleged violation of constitutional rights, a state may no more discriminate on the basis of poverty than of race, religion, or color. *Griffin v. Illinois*, *supra*, at p. 17. Discrimination on the basis of

illiteracy, or other physical or mental inability* to prepare an adequate petition to the courts, such as that worked by the Tennessee regulation at bar, is an equally impermissible denial of equal protection.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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September 1968

* Prisoners need not be wholly illiterate to be incapable of preparing writs, although statistics show that prison populations contain a much higher percentage of illiterates than the national population as a whole. See Note, *Prison "No-Assistance" Regulations and the Jailhouse Lawyers*, 1968 Duke L. J. 343, 348 fn. 23. A relatively large number of prisoners may, also be mentally defective or retarded, and similarly unable to prepare their own papers. *Id.*, at p. 348, fn. 24. And even those inmates with "normal" intelligence may be totally incapable of ascertaining what facts are relevant in showing constitutional violations, and therefore of drawing up even minimally acceptable writs. See Krause, *A Lawyer Looks at Writ-Writing*, 56 Cal. L. Rev. 371, 374 (1968).